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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

[Protest of Navy Contract Award]

FILE: B-199199

DATE: December 2, 1980

MATTER OF: Jekyll Towing and Marine Services Corporation

DIGEST:

1. Protest that minimum vessel length and speed requirements are restrictive of competition and were added to solicitation to exclude protester from competition is untimely since it was not filed prior to closing date for submission of proposals as required by GAO Bid Protest Procedures.
2. Solicitation provision requiring compliance with applicable Coast Guard and Federal regulations and instructing offerors to "indicate whether or not their vessels are Coast Guard certified" does not impose requirement which must be met as condition of award but leaves to offerors responsibility to comply, during contract performance, with any applicable regulations.
3. Allegation that Navy is violating law by refusing to incorporate specific certification requirement in solicitations is untimely since absence of certification requirement is defect on face of solicitation which should have been challenged prior to closing date.
4. Allegation that performance of contract was improperly delayed as accommodation to contractor is without merit where solicitation stated that performance will commence "on or about" June 9 and performance actually commenced on June 12.
5. General allegations of improper Navy practices in connection with past procurements are untimely.

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6. There exists no legal basis for allowing an unsuccessful bidder to recover anticipated profits or protest costs.

Jekyll Towing and Marine Services Corp. (Jekyll) protests the award of a contract by the Military Sealift Command, Department of the Navy (Navy), to the University of Delaware (Delaware) under request for proposals (RFP) No. N00033-80-R-0045.

This solicitation, issued on May 13, 1980, sought proposals to furnish a U.S. flag support vessel for use in conducting certain offshore tests, including sonar calibrations. Four offerors responded prior to the May 30, 1980 closing date as follows:

<u>Offeror (Vessel)</u>	<u>Evaluated Cost</u>
1. Sea Research & Development Services, Inc. (<u>Miss Juanita</u>)	\$22,369
2. Jekyll (<u>Jekyll Isle</u>)	\$31,032
3. Delaware (<u>Cape Henlopen</u>)	\$34,392
4. Zapata Marine Service (<u>Heritage Service</u>)	\$109,428

Although Sea Research and Development Services was the low offeror, that firm was awarded a contract for similar services under a separate Navy solicitation, and the Miss Juanita was consequently unavailable for charter. Jekyll's proposal, the next lowest, was rejected as nonconforming to the specifications: the Jekyll Isle is only 76 feet long and capable of only

an 11.3 knot top speed, while the RFP required a vessel of 100 or more feet in length, capable of making 14 knots (or 11 knots if no vessel at the greater speed was available). On June 4, 1980, the contract was awarded on the basis of initial proposals to Delaware, the low remaining offeror.

The protester seeks a ruling by our Office that its proposal was improperly rejected and that Delaware was not qualified for the award. While Jekyll readily concedes that its vessel does not meet the length and speed requirements stated in the RFP, it submits that these provisions were restrictive of competition and, further, that the speed requirement was added by amendment "with the probable hopes of eliminating [Jekyll] from the bidding process." Jekyll asserts that its vessel was well-suited for the charter and it should therefore have received the award based upon its low price. The protester also maintains in the alternative that Delaware's vessel, the Cape Henlopen, was "illegal" and therefore not eligible for the award since the solicitation required a vessel which satisfied applicable Coast Guard and other Government regulations and the Cape Henlopen lacks proper Coast Guard certification. Jekyll then reasons that in view of the ineligibility of the Cape Henlopen, the provisional clause of the speed requirement became operable, to wit, an 11 knot top speed became acceptable. Since Jekyll also claims that the contracting officer orally agreed to waive the length requirement for otherwise seaworthy vessels, it concludes that it should have received the award.

As the contract has been completed, Jekyll seeks monetary damages as measured by the value of this lost contract, the time involved in preparing this protest, and the cost of several safety features built into the Jekyll Isle on the faulty presumption that Jekyll otherwise would not qualify for contracts such as the one in question.

The Navy submits that the 14 knot requirement was necessary since the calibration work required the vessel to remain dead in the water for extended periods, the vessel would therefore be subject to drifting, and the swiftest possible return to the testing area was deemed desirable. Similarly, the 100 foot minimum length specification was considered necessary since smaller vessels had performed unsatisfactorily in prior similar procurements. The Navy further suggests that this portion of the protest is untimely under our Bid Protest Procedures, 4 C.F.R. Part 20 (1980).

Our Bid Protest Procedures require that protests against alleged improprieties in a solicitation which were apparent prior to the closing date for submission of proposals be filed prior to that date. 4 C.F.R. 20.2 (b)(1) (1980). We have previously ruled that a protest alleging restrictive specifications is untimely where filed after the closing date. Clarke & Lewis, Inc., B-196954, January 8, 1980, 80-1 CPD 24; AnaMed Hawaii, B-196438, October 30, 1979, 80-1 CPD 1. Here, the closing date for submission of proposals was May 30, 1980 and Jekyll's protest was not filed until June 12, 1980, following the award to Delaware. Consequently, this aspect of the protest is untimely.

We point out, however, that Jekyll has failed to establish that any of the Navy's specifications were in excess of its minimum needs, Science Applications, Inc., B-197099, May 20, 1980, 80-1 CPD 348, or that the 14 knot speed requirement was added to exclude Jekyll from the competition. Sub-Sea Systems, Inc., B-195741, February 12, 1980, 80-1 CPD 123. The record contains no affirmative evidence, beyond Jekyll's speculation, that the Navy intended to exclude the protester, and, in fact, documents the "inordinate" amount of time spent repositioning a support vessel not capable of 14 knots on a prior similar contract. We therefore would be unable to conclude that inclusion of this specification was without

a reasonable basis.

Jekyll's second principal contention arises in connection with the May 20, 1980 amendment of paragraph two of the RFP. As initially drafted, that section stated that:

"2. Vessels offered shall meet all applicable requirements of the U.S. Coast Guard and other Government regulatory authorities and must conform to the following specifications:"

The amendment added a second clause:

"(Offerors should indicate whether or not their vessels are Coast Guard certified)."

It is Jekyll's position that this paragraph as amended established a requirement that offered vessels possess Coast Guard certification for the transport of passengers and cargo for hire since the charter involved carrying Navy personnel and testing equipment to and from the offshore test site. Delaware lacked such certification for the Cape Henlopen and thus, in Jekyll's view, its proposal should have been rejected as "nonresponsive" to the RFP.

Jekyll considers persuasive in this respect the fact that the Coast Guard agreed the Cape Henlopen lacked proper certification and, on that basis, initially denied it permission to embark on the charter. The Navy finally overcame the certification requirement applicable to the transport of "passengers" and "cargo" by leasing the equipment to Delaware and using Delaware's personnel, an arrangement reportedly approved by the Coast Guard. However, upon returning to port following performance of the contract, the Cape Henlopen's captain was charged with violating marine safety laws. Although

these charges were later dropped (the Coast Guard granted the Navy a retroactive waiver of the certification requirement for this charter), Jekyll maintains that this scenerio evidences the illegal status of the Cape Henlopen and, thus, the unacceptability of Delaware's proposal.

The Navy stipulates to most of the essential facts involved here, but denies that it knowingly contracted for an illegal vessel. Rather, it explains that a representation in Delaware's proposal that the Cape Henlopen was an "uninspected oceanographic research vessel" was construed as a claim of exemption from the inspection laws applicable to vessels transporting passengers and cargo for hire. See 46 U.S.C. § 441 et seq. Apparently, the Cape Henlopen had been chartered under previous similar procurements with no objection from the Coast Guard, and the Navy thus was aware of no basis for rejecting it as an illegal vessel on this occasion.

We have recognized that a solicitation provision requiring generally that offerors comply with Federal, State and local laws and regulations places responsibility for obtaining necessary licenses and permits upon the contractor. This is not a matter of responsiveness or responsibility and the contracting officer need not consider whether such licenses have been obtained in determining an offeror's eligibility for award. Rather, the need for a license to perform the contract is left to be resolved by the offeror and the licensing authority. Washington Patrol Service, Inc., B-195900, August 19, 1980, 80-2 CPD 132; B&W Stat Laboratory, Inc., B-195391, March 10, 1980, 80-1 CPD 184. On the other hand, where there is an express solicitation requirement that an offeror hold a particular license or permit, compliance therewith is a matter of offeror responsibility. Veterans Administration--Request for Advance Decision, B-184384, July 29, 1975, 75-2 CPD 63.

In our view, paragraph two of the instant solicitation, even as amended, is a general requirement which merely charges the contractor with responsibility for complying with Federal requirements, including the acquisition of all necessary certifications and licenses. Despite the addition of a clause instructing offerors to indicate whether the offered vessels were Coast Guard certified, consideration for award was not predicated upon such certification, and no evidence of certification was required. Under these circumstances, the determination of whether Coast Guard certification had been obtained had no bearing on the award of the contract or the responsibility of the offeror, B&W Stat Laboratory, Inc., supra, and the award to Delaware was therefore not improper merely because the Cape Henlopen was uncertified. Consequently, award to Jekyll would have been improper under the terms of the RFP since a vessel conforming to the Navy's specifications and capable of 14 knots, the Cape Henlopen, was available. We need not reach the question of the alleged oral waiver of the length requirement.

Jekyll makes a broader allegation that the Navy has been violating Federal law and Coast Guard regulations by refusing to incorporate a mandatory Coast Guard certification requirement in this and all other appropriate solicitations. The Navy's refusal is grounded in its belief that vessels performing Naval sonar and acoustical tests are "oceanographic research vessels" within the meaning of 46 U.S.C. § 441(1), and as such are exempt from Coast Guard certification. Both the Coast Guard and Jekyll disagree with this interpretation.

This issue is untimely. As noted above, alleged solicitation improprieties apparent prior to the closing date for submission of proposals, must be filed prior to that date. 4 C.F.R. 20.2(b) (1). Absence of a

certification requirement is a defect on the face of a solicitation and therefore must be protested prior to the closing date. See, for example, A.C.E.S., Inc., B-182720, February 13, 1975, 75-1 CPD 97. This issue was not raised until after the closing date, and therefore is not for consideration on the merits. We do note, however, that the Navy has apparently agreed with the Coast Guard to include a specific certification requirement in future solicitations involving sonar and acoustical testing services, although it has indicated that waivers in the interest of national defense will be sought where no certified vessels are able to meet specifications. See 33 C.F.R. Part 19.

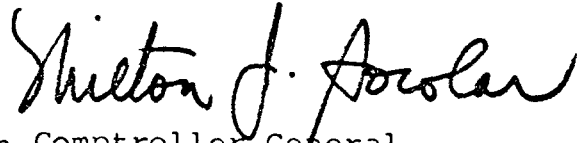
The protester also alleges that the Navy, as an accommodation to Delaware, improperly delayed performance of the charter in question since the Cape Henlopen had encountered mechanical difficulties and was temporarily indisposed. This allegation is without merit. The RFP did not specify a particular date upon which performance was to begin but stated that it was to commence "on or about" June 9, 1980. The record shows that performance actually began on June 12 which, in our opinion, was consistent with the solicitation.

Jekyll levels a number of additional charges against the Navy, namely that it has neglected to advertise all RFPs in the Commerce Business Daily, failed to afford Jekyll the opportunity to compete for "availability contracts", and has indiscriminately used national defense waivers to circumvent marine inspection and safety laws. These issues are not raised in the context of the procurement in issue, however, and thus are not for consideration in this decision. Moreover, since they apparently relate to earlier procurements, they are untimely under our Bid Protest Procedures.

In light of the above, we find the protest to be without merit. Moreover, with respect to the claim for damages, we point out that there exists no legal basis for allowing an unsuccessful bidder to recover anticipated profits, protest costs or other monetary damages

claimed here. See United Telecontrol Electronics, Inc.,
B-191981, February 14, 1979, 79-1 CPD 104; Applied
Control Technology, B-190719, September 11, 1978, 78-2
CPD 183.

The protest is dismissed in part and denied in
part.

A handwritten signature in black ink, reading "Shilton J. Arolar". The signature is written in a cursive, flowing style.

For the Comptroller General
of the United States